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U.S. DISTRICT COURT
DISTRICT OF WYOMING
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 01-CV-86B
	)	
USDA ET AL,	)	
	)	
Defendant(s).	)	

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT OR ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)

Since January, 2003, the State of Wyoming has advocated that the decision as to what portions of Wyoming's National Forests should remain roadless must be decided at the individual National Forest planning level. Wyoming has argued that if planning is done at this level, which is closest to the people who are affected by decisions concerning National Forest use, the proper balance between multiple uses can be achieved. If, however, planning is done at a national scale such as occurred with regard to the Clinton Roadless Rule, real people on the ground in Wyoming have no voice in decisions that are profoundly important to them in terms of jobs, recreational

opportunities, and quality of life issues. It is with these important policy considerations in mind that Wyoming approaches this Court asking for relief.

Tortured history of the Clinton Roadless Rule.

In January 2001, during the waning hours of Bill Clinton's presidency, the United States Department of Agriculture ("USDA") adopted the Clinton Roadless Rule. In May 2001, Wyoming filed a Complaint for Declaratory Judgment and Injunctive Relief in the United States District Court for the District of Wyoming. This Complaint alleged that the USDA, the United States Forest Service, and two federal officials ("Federal Defendants") had adopted the Clinton Roadless Rule in violation of multiple federal statutes.

In July, 2003, the Wyoming District Court held that the Clinton Roadless Rule was promulgated in violation of the National Environmental Policy Act ("NEPA") and the Wilderness Act and ordered that the Clinton Roadless Rule should be permanently enjoined. *See, Wyoming v. United States Dep't of Agric.*, 277 F.Supp. 2d 1197 (D.Wyo. 2003) ("2003 Order"). Environmental intervenors appealed the decision. The Federal Defendants did not appeal.

The Tenth Circuit Court of Appeals heard oral arguments on the appeal on May 4, 2005. On May 5, 2005, the Federal Defendants announced they were adopting the 2005 Roadless Rule which was published in the Federal Register on May 13, 2005. *See,* 70 FED. REG. 25654-25662.

On July 11, 2005, the Tenth Circuit ruled that the issues in the appeal regarding the Clinton Roadless Rule were moot as a result of the issuance of the 2005 Roadless Rule. *See, Wyoming v. United States Dep't. of Agric.*, 414 F.3d 1207, 1210-1213 (10th Cir. 2005). The Tenth Circuit vacated the judgment of this Court and remanded the case to the Wyoming United States District Court with directions to dismiss the case without prejudice.

In late August, 2005, California, New Mexico, Washington, and Oregon filed suit against the Federal Defendants in the United States District Court for the Northern District of California challenging the 2005 Roadless Rule. On or about October 5, 2005, a coalition of 20 environmental groups filed suit in the United States District Court for the Northern District of California. The two lawsuits were subsequently consolidated.

On October 18, 2005, the State of Wyoming filed a Motion to Recall Mandate in the Tenth Circuit. Wyoming urged the Tenth Circuit to recall the mandate it had issued on September 2, 2005, in *Wyoming v. United States Dep't. of Agriculture* on the grounds that the 2005 Roadless Rule was being challenged in the Northern District of California and that environmental groups, including six groups who were parties to the Tenth Circuit case, were requesting the United States District Court in California to order the reinstatement of the Clinton Roadless Rule. Wyoming argued that without recall of the mandate, the Clinton Roadless Rule, which had been found to be in direct violation of federal law, could spring back into existence resulting in a manifest injustice. The Tenth Circuit denied the Motion to Recall Mandate on November 2, 2005, and ordered the District Court to dismiss the Plaintiffs' claims without prejudice. This Court dismissed the case without prejudice on January 3, 2006.

Unfortunately, the events argued in the Motion to Recall Mandate filed with the Tenth Circuit on October 18, 2005, have come to fruition. On September 19, 2006, a United States Magistrate Judge in the Northern District of California struck down the 2005 Roadless Rule and reinstated the Clinton Roadless Rule. *See, Calif. v. U.S. Dep't. of Agric.*, Case No. C05-03508 (N.D. Calif., 9/19/06). Based on this action by the California court, the Clinton Roadless Rule, which was found by this Court to be illegal under federal law, is now the law of the land. This Court must grant the State of Wyoming relief from the order it issued on January 3, 2006, pursuant to FED. R. CIV. P., Rule 60(b).

This Court has the discretion to grant the State of Wyoming relief from the Order entered by the Court of January 3, 2006, pursuant to Rule 60(b)(6).

On January 3, 2006, and acting pursuant to the explicit direction of the Tenth Circuit Court of Appeals, this Court entered an Order dismissing Wyoming's challenge to the Clinton Roadless Rule. On that date, the 2005 Roadless Rule was in full force and effect and, in the view of the Tenth Circuit, issues concerning the validity of the Clinton Roadless Rule were moot. Because every factual predicate underlying the Court Order has now changed, this Court must grant the State of Wyoming relief pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Rule 60(b)(6) provides that a district court may grant relief from a judgment, order, or proceeding for "any . . . reason justifying relief from the judgment." Rule 60(b)(6) has been described by the Tenth Circuit as a "grand reservoir of equitable power to do justice in a particular case." *See, Pierce v. Cook & Co.*, 518 F.2d 720, 722 (10th Cir. 1975) (*en banc.*) (internal quotation marks omitted). While a district court may grant Rule 60(b)(6) relief only in extraordinary circumstances and only when necessary to accomplish justice, *see, Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 729 (10th Cir. 1993), the case at hand presents such extraordinary circumstances and without such relief will result in a denial of justice to the State of Wyoming.

The decision to grant Rule 60(b)(6) relief is vested in the sound discretion of the trial court. *See, FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1988). A district court has substantial discretion to grant relief as justice requires under Rule 60(b). *See, Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146-47 (10th Cir. 1990) (Tenth Circuit will reverse a district court decision under 60(b) "[O]nly if we find a complete absence of a reasonable basis and are certain that the district court's decision is wrong . . ..").

While the Tenth Circuit has never had the occasion to address facts similar to those at bar, the court has recognized that Rule 60(b)(6) relief would be proper where a party experienced an

unanticipated intervening change of circumstance. *See, Cashner v. Freedom Stores*, 98 F.3d 572, 579 (10th Cir. 1996). There, the court cited Wright and Miller for the proposition that "[t]he broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests." *Cashner*, 98 F.3d at 580.

Here, Wyoming has taken every step to protect its legal interest in the very favorable judgment it obtained from the Court on July 14, 2003. The State vigorously defended this ruling in briefing and argument in the Tenth Circuit. The State vigorously opposed vacatur of the Order including asking the Tenth Circuit to recall its mandate and stay its decision pending the outcome of the California litigation on the 2005 Roadless Rule.

However, despite exercising every legal tool available to the State, the Clinton Roadless Rule has sprung back into existence. The State has taken every "legal step to protect its own interest" yet is without the benefit of a highly favorable ruling from this Court because of an "intervening change of circumstance." While the State certainly forecast that such an unjust result might occur, the State did everything possible to prevent such injustice and is entitled to Rule 60(b)(6) relief.

To preserve the integrity of the judicial process and to prevent an injustice from occurring this Court must recall and vacate the January 3, 2006, Order and reinstate the July 14, 2003, Order which permanently enjoined the Clinton Roadless Rule. During the proceedings before the Tenth Circuit in this case, the Wilderness Society, the Sierra Club, Defenders of Wildlife, and the Pacific Rivers Council argued that the 2003 Order must be vacated to protect their interests. These groups then filed suit in federal district court in California and obtained an order reinstating the Clinton Roadless Rule. By so doing, they achieved a result in another jurisdiction that they were unable to attain on the merits before this Court. This type of forum shopping does violence to the integrity of the judicial process. This Court can preserve the integrity of the judicial process by recalling and

vacating the 2006 Order and by reinstating the 2003 Order to permanently enjoin the Clinton Roadless Rule.

Recalling and vacating the 2006 Order and reinstating the 2003 Order also will promote the efficient administration of justice. If this Court does not recall and vacate the 2006 Order, Wyoming will be forced to file a new challenge in this Court to have the Clinton Roadless Rule permanently enjoined for a second time. The parties in the new challenge will make the same legal arguments based upon the same evidence in the administrative record as they made in the first case. The Court will apply the same law that was applied in the last review. Given that neither the evidence nor the pertinent law has changed since this Court issued the 2003 Order, the outcome in the second challenge should be the same as the outcome in the first challenge. Accordingly, a new appeal in this case will require this Court to use its limited and valuable resources to redo what has already been done. This Court can avoid such an inefficient result by recalling and vacating the 2006 Order and reinstating the 2003 Order.

Although it was the Tenth Circuit panel that vacated the 2003 Order, this Court has authority to reinstate the 2003 Order pursuant to Rule 60(b)(6). Before 1976, appellate leave was required before a federal district court could use Rule 60(b) to reopen a case which had been reviewed on appeal. *See, Standard Oil of California v. United States*, 429 U.S. 17, 18 (1976). This "appellate-leave" requirement was based upon the belief "that an appellate court's mandate bars the trial court from later disturbing the judgment entered in accordance with the mandate" and that the requirement protected the finality of the judgment and allowed the appellate court to screen out frivolous Rule 60 motions. *Standard Oil of California*, 429 U.S. at 18.

In 1976, the United States Supreme Court struck down the "appellate-leave" requirement. *Id.* As the Court explained:

> [T]he arguments in favor of requiring appellate leave are unpersuasive. Like the original district court judgment, the appellate mandate relates to the record and issues before the court, and does not purport to deal with possible later events. **Hence, the district judge is not flouting the mandate by acting on the [Rule 60(b) motion].** Furthermore, the interest in finality is no more impaired in this situation than in any Rule 60(b) proceeding.

Standard Oil of California, 429 U.S. at 18 (emphasis added)(citations omitted).

The Tenth Circuit has adopted the *Standard Oil* rule regarding consideration of Rule 60(b) motions after a case has been reviewed on appeal. *See, FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1273 (10th Cir. 1998). In the Tenth Circuit, a district court "is not flouting the mandate of the appellate court by acting on a [Rule 60(b)] motion raising events occurring after the trial or appeal[.]" *See United Pac. Ins. Co.*, 152 F.3d at 1273.

Wyoming bases its Rule 60(b) motion upon the fact that the federal district court in California has reinstated the 2001 Roadless Rule, an event that occurred long after this Court ruled on the merits of this case and the Tenth Circuit panel issued its mandate after appeal. Because Wyoming 's Rule 60(b) motion raises events occurring after the trial and appeal in this case, this Court will not be "flouting the mandate" of the Tenth Circuit panel by granting the relief requested in the motion. *See, Standard Oil of California*, 429 U.S. at 18; *United Pac. Ins. Co.*, 152 F.3d at 1273.

A District Court sitting as an appellate court reviewing a final agency action has the inherent power to recall a final order or mandate issued in the matter to prevent a manifest injustice.

In *Olehouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), the Tenth Circuit left no doubt that a challenge to a final agency action taken by a federal regulatory agency must be treated as an appeal by the District Court. There, the court stated that "[r]eviews of agency action in the district courts must be processed **as appeals**." *Id.* at 1580 (emphasis in original, bracketed material added). Thus, when this Court issued its Order in July, 2003, striking down and permanently enjoining the Clinton Roadless Rule, it did so as an appellate court. Likewise, when the Court issued its Order dismissing Wyoming's appeal of the adoption of the Clinton Roadless Rule on January 6, 2006, this Court did so as an appellate court.

The 2006 Order marked the end of this Court's appellate jurisdiction over Case Number 01-CV-86B. Given that this Court was sitting in an appellate capacity when it issued the Order, the Order was, in fact, a mandate. *See, Northern California Power Agency v. Nuclear Regulatory Comm'n*, 393 F.3d 223, 224 (D.C. Cir. 2004) (a mandate formally marks the end of appellate jurisdiction). In fact, a motion to recall a mandate is treated by courts as the equivalent of a Rule 60(b) motion. *Id.* at 225 and cases cited therein. Although no statute or rule authorizes an appellate court to recall a mandate, "the practice has long been recognized as an inherent part of the judicial power." *Northern California Power Agency*, 393 F.3d at 224. An appellate court may recall a mandate at any time if recalling the mandate is necessary to prevent an injustice or to preserve the integrity of the judicial process. *See, Ute Indian Tribe of the Uintah & Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1522 (10th Cir. 1997), citing *Am. Iron & Steel Inst. v. EPA*, 560 F.2d 589, 593 n.15 (3d Cir. 1977) & *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 275-280 (D.C. Cir. 1971). "[T]he power to recall or modify a mandate is limited and should be exercised only in extraordinary circumstances." *Ute Indian Tribe of the Uintah & Ouray Reservation*, 114 F.3d at 1522.

As argued *infra*, recalling and vacating the 2006 Order and reinstating the 2003 Order will protect Wyoming from suffering a manifest injustice. Wyoming expended a considerable amount of resources in successfully challenging the legality of the Clinton Roadless Rule in this Court, but was deprived of the fruits of its efforts when the Tenth Circuit vacated the permanent injunction of the Clinton Roadless Rule on mootness grounds. Now that the Clinton Roadless Rule has been reinstated, Wyoming will be subject to a rule this Court has held to be contrary to the NEPA and the Wilderness Act. It is manifestly unjust for Wyoming to be subjected to an illegal federal rule, particularly when the ground for vacating the permanent injunction of the Clinton Roadless Rule no longer exists. This Court can prevent this manifest injustice by reinstating the 2003 Order to permanently enjoin the Clinton Roadless Rule.

Conclusion

For the reasons argued here, this Court must grant relief to Wyoming by vacating the 2006 Order of the Court dismissing this matter and reinstating the Court's 2003 Order permanently enjoining the Clinton Roadless Rule.

Dated this 22nd day of September, 2006.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of September, 2006, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT OR ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b) was served upon the following as indicated:

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